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CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

GRUPE COMPANY et al., Petitioners, v. WORKERS' COMPENSATION APPEALS BOARD and RUBY RIDGEWAY, Respondents.	C041291 (WCAB No. STK065671)

Proceedings to review a decision of the Workers' Compensation Appeals Board. Petition denied and matter remanded for purpose of making supplemental award of attorney fees.

Mullen & Filippi and Paula E. White for Petitioners.

No appearance for Respondent Workers' Compensation Appeals Board.

Farrell, Fraulob & Brown and Melissa C. Brown for Respondent Ridgeway.

Capurro, Rocha & Walsh and Joseph V. Capurro for California Applicant's Attorney's Association as Amicus Curiae on behalf of Respondent Ridgeway.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts I, II, and IV.

Respondent Ruby Ridgeway, while working for petitioner Grupe Company (Grupe) as a computer operator, injured her upper extremities and neck and was awarded temporary disability payments. Petitioner Ace USA (Ace) provided workers' compensation insurance coverage for Grupe. Grupe and Ace's petition to terminate temporary disability was granted. A Workers' Compensation Appeals Board judge (WCJ) found Ridgeway suffered from a permanent partial disability of 39 percent and awarded future medical treatment and attorney fees. In so finding, the WCJ struck the testimony of Ridgeway's vocational rehabilitation expert as violating a discovery order. Ridgeway filed a petition for reconsideration. After granting the petition, respondent Workers' Compensation Appeals Board (WCAB) issued a decision after reconsideration, finding Ridgeway's expert's opinion was admissible and remanding the matter for further development of the medical record.

Petitioners appeal, contending: (1) Ridgeway violated the discovery order, and her expert's opinion should not be considered; (2) petitioner Ace should not be required to pay costs because of the violation of the discovery order; (3) the medical opinion relied upon by the WCJ constituted substantial evidence; and (4) the WCAB erred in ordering further development of the medical record. We find, as a threshold matter, that the opinion and order granting reconsideration and decision after reconsideration is a final order that can be appealed. We conclude the admission of Ridgeway's expert's testimony

comported with Labor Code section 5502, former subdivision (d)(3).[1] We shall deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

Ridgeway suffered an industrial injury in March 1987 that affected her upper extremities and neck. In March 1989 a WCJ awarded temporary disability payments from the date of injury and continuing, along with further medical care.

In 1992 petitioners filed a petition to terminate temporary disability benefits. The parties entered a stipulation agreeing temporary disability would terminate at the end of July 1992 and vocational rehabilitation temporary disability benefits would begin immediately thereafter.

Subsequently, Ridgeway's condition deteriorated, interrupting vocational rehabilitation. Temporary disability payments began again in August 1994. In April 1996 vocational rehabilitation began anew but was again interrupted. Temporary disability payments recommenced in August 1997.

In June 1999, relying on the opinion of its expert, Dr. Ernest M. Weitz, petitioners filed a petition to terminate liability for temporary disability under California Code of Regulations, title 8, section 10466. Ridgeway objected.

At the hearing, the parties submitted medical reports, but no testimony was taken. The WCJ issued findings and an order. The WCJ determined there was no good basis to terminate

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[1] All further statutory references are to the Labor Code unless otherwise indicated.

temporary total disability. The WCJ also considered Dr. Weitz's opinion, submitted by petitioners. The WCJ concluded: "The reporting of Dr. Weitz is anything but substantial evidence on the issue at hand. The report is stale (11-19-98), and his statement that applicant is permanent and stationary is not based upon substantial evidence."

Petitioners filed another petition to terminate temporary disability in June 2000. Petitioners relied on a May 2000 report by Dr. Weitz. Following a hearing, the WCJ granted petitioners' petition to terminate liability for temporary total disability.

In his opinion, the WCJ found: "The applicant is simply on what appears to be a medical maintenance program. [¶] Applicant also told Dr. Weitz that she would be looking for work at the time she saw him this May. She also stated at trial that both her shoulders were worsening. That simply does not correlate with what she told Dr. Weitz. She testified at trial that she also had given Dr. Weitz a truthful and complete history. [¶] The Court found that Dr. Weitz' opinion was not persuasive on the issue in July of 1999. Such was predicated in great part upon Dr. Weitz' opinion that she was still in need of ongoing physical therapy sessions. He finds that she is not in need of such ongoing treatment at this time."

There was no appeal from the order terminating temporary disability. Petitioners filed a declaration of readiness to proceed on permanent disability and related issues. Petitioners informed the WCAB that a settlement had been offered but

Ridgeway declined to reach a settlement until she had completed her vocational rehabilitation program. Ridgeway also stated her intent to pursue a *LeBoeuf* theory in that regard.[2] Under the rationale of *LeBoeuf*, an injured worker is deemed 100 percent permanently disabled if the evidence demonstrates the worker is medically and vocationally precluded from competing in the open labor market. Ridgeway filed an objection to the declaration of readiness to proceed.

Following a continuance to allow Ridgeway to complete her vocational rehabilitation program, the parties attempted settlement but failed. The parties, in a mandatory pretrial conference statement, stipulated to facts, issues, and witnesses. In the statement, Ridgeway listed as a witness "Dan Sidhu re Le Beauf [*sic*]." Ridgeway provided no other information regarding Sidhu's anticipated testimony.

Trial began on August 27, 2001, and concluded on September 6, 2001. Ridgeway testified about her injury, her three subsequent shoulder surgeries, and her participation in three vocational rehabilitation programs. During her last foray into rehabilitation, she missed several days and found training involving the computer painful. The pain necessitated frequent breaks. Even when not working, Ridgeway experiences pain shooting through her shoulders, and her right shoulder tends to lock up.

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[2] *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 (*LeBoeuf*).

Ridgeway testified she felt she could work at home, where she could get up and walk around when necessary. She is never without pain and requires help in dressing.

Ridgeway also presented testimony on the *LeBoeuf* issue.

Frank Daniel Sidhu, a vocational rehabilitation counselor, assesses the vocational feasibility of injured workers. Sidhu testified he performed a vocational evaluation of Ridgeway. As Sidhu described it: "The nature of the evaluation was an assessment of Ms. Ridgway's [*sic*] feasibility for employment in the open labor force, and I took . . . into account . . . national statistics, California statistics and local labor market [in] San Joaquin County."

In connection with the evaluation, Sidhu reviewed Ridgeway's medical file and met with her on July 25, 2001, August 2, 2001, and August 8, 2001. He reviewed Ridgeway's vocational rehabilitation reports and performed independent vocational testing. Sidhu provided detailed descriptions of a variety of vocational tests he administered and discussed the results at length. Sidhu also provided a detailed account of his analysis of Ridgeway's subjective complaints concerning pain.

Sidhu testified that based on his extensive evaluation, Ridgeway was motivated to return to work. However, Sidhu concluded: "Based upon the entire review and her education level, all that we discussed, including the work history, it's my conclusion that she was not vocationally feasible at the time

of my evaluation, and I do not believe her to be a feasible candidate for the plans as written . . . ."

On cross-examination, Sidhu admitted his opinion as to Ridgeway's inability to compete in the labor market was created after August 17, 2001. Petitioners moved to strike the testimony, arguing it was developed after the close of discovery on July 10, 2001. The trial court denied the motion without prejudice.

Petitioners presented testimony by a rehabilitation counselor, who testified Ridgeway's rehabilitation plans were part time with a goal of part-time work. Although the counselor stated Ridgeway experienced pain, she was also enthusiastic. While the counselor shared Ridgeway's concerns about her ability to work, the counselor believed Ridgeway could work if she felt able. Ridgeway was personable and could sell herself to employers.

Petitioners submitted a posttrial brief.

The WCJ issued a "Findings and Award and Orders and Opinion on Decision." The WCJ made numerous findings, including: (1) Ridgeway suffers partial disability in the amount of 39 percent, (2) there is need for further medical treatment to cure or relieve the effects of the industrial injury, (3) self-procured medical treatment was reasonable and reimbursable by petitioners, and (4) an attorney fee of 12 percent would be allowed.

The WCJ also concluded Ridgeway "was not a credible witness on her own behalf. When faced with contradictions between her

testimony and the history given to examining physicians and her rehabilitation counselor, she had not [*sic*] explanation except that others were mistaken. [¶] The reporting and conclusions of Dr. Tempkin [the treating physician] are unfounded and speculative. The Court cannot rely upon such an opinion that does not have its basis in the facts of this case. In contrast, the opinion of Dr. Weitz (who the parties will note the Court previously had relied upon for a substantive finding) was found to be thorough, correct, and corroborated by the entire credible factual record. Dr. Weitz' opinion was used for all determinations of a medical nature including permanent and stationary date, permanent partial disability, and need for medical treatment."

The WCJ also discussed the testimony of Ridgeway's witness Sidhu. The WCJ found: "What is clear from Exhibit '3' and the testimony [of] witness Sidhu was that this discovery was not even **attempted** until after the Court specifically ordered discovery closed on 7/10/01. Applicant clearly violated the discovery order of this Court. Applicant cannot now stand before this Court and seek reimbursement for such costs. Further, applicant cannot introduce testimony of a supposed expert based on matters not attempted until after discovery was closed. To allow the testimony in would be a clear-cut denial of due process for defendant. [¶] The Court did review the testimony and exhibits of witness Sidhu and, even if his testimony and documents were to be fully considered by the Court, nothing would change. His testimony was less than

compelling as to applicant's ability to profit from vocational retraining. It is clear that her lack of ability to profit is more a motivational problem than related to her industrial injury."

Ridgeway filed a motion to strike the recommended rating, arguing the rating failed to incorporate the testimony of her vocational rehabilitation expert, Sidhu. According to Ridgeway, Sidhu's testimony provided substantial evidence as to the vocational impact of her medical restrictions.

Petitioners filed a response to Ridgeway's motion to strike the recommended rating. Petitioners argued, under section 5502, former subdivision (f), discovery closes at the mandatory settlement conference, and therefore Sidhu's testimony was inadmissible. In addition, petitioners argued the recommended rating reflected the medical evidence.

After the WCJ issued his findings and award, Ridgeway filed a petition for reconsideration with the WCAB. Ridgeway contended the WCJ erred in striking Sidhu's testimony, Sidhu's testimony constituted substantial evidence, and Weitz's opinion was not substantial evidence. Petitioners filed a response to the petition.

Subsequently, the WCJ submitted an amended report and recommendation on the petition for reconsideration. In April 2002 the WCAB issued an "Opinion and Order Granting Reconsideration and Decision after Reconsideration." In the opinion, the WCAB concluded the disclosure of Sidhu as an expert on the pretrial conference statement fulfilled the requirements

of section 5502, former subdivision (d)(3). The WCAB noted: "Although it was not until . . . 15 days after the [mandatory settlement conference] that Mr. Sidhu first met with the applicant, we note that defendant could have reserved its rights at the MSC to depose Mr. Sidhu prior to trial or to obtain its own rehabilitation consultant and conduct a deposition in rebuttal." The WCAB held: "[O]n remand, consideration must be given to the testimony of Mr. Sidhu, which is relevant on the issue of the extent of applicant's permanent disability . . . ."

The WCAB traced the series of reports by Dr. Weitz, petitioners' expert, and found: "Given applicant's testimony and the fact that Dr. Weitz did not change his opinion in May 2000 from that of his initial permanent and stationary report of November 19, 1998, we are persuaded that his report on applicant's permanent disability is stale [fn. omitted] and therefore deficient. [¶] We are persuaded that further development of the record is necessary including a new permanent and stationary report on the extent of applicant's permanent disability. Therefore, on remand, the WCJ should require the parties to obtain updated medical evidence."

Grupe and Ace filed a petition for writ of review. Ridgeway filed an answer. The California Applicant's Attorney's Association filed an amicus curiae brief in support of Ridgeway.

DISCUSSION

I

Appealability. At the outset, the parties disagree over whether the order at issue is a final order subject to review.

Petitioners contend the order granting reconsideration and decision after reconsideration is a final order because it affects a substantive right of a party: the liability of petitioners.

Ridgeway argues that if the order in question is construed to affect a substantive right simply because of the potential for higher liability, "then each and every decision of the WCAB is subject to Judicial Review." The amicus curiae agrees with Ridgeway, claiming petitioners "challenge[] 80+ years of case law in an effort to overturn a preliminary evidentiary ruling which does nothing more than entitle both parties to go back before the trier of fact. It does not immediately expose defendant to any greater liability that [*sic*] the initial award. It does not guarantee the result sought by the respondent."

The WCAB decision and order challenged by petitioners did not decide the merits of Ridgeway's claim for compensation, and it is possible Ridgeway may receive an increase in her disability rating and compensation following further discovery and trial. Were the usual rules of civil appellate practice to apply, the WCAB's order would not be a final, and therefore not an appealable, order. (See Code Civ. Proc., § 904.1; *Rao v. Campo* (1991) 233 Cal.App.3d 1557, 1565.) The final judgment rule seeks to prevent costly piecemeal dispositions and multiple reviews, which burden the courts and impede the judicial process. (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 741, fn. 9.)

However, the final judgment rule, ubiquitous in civil appeals, does not hold sway in the arena of WCAB appeals. Section 5950, which governs WCAB appeals, states: "Any person affected by an order, decision, or award of the appeals board may, within the time limit specified in this section, apply to the Supreme Court or to the court of appeal for the appellate district in which he resides, for a writ of review, for the purpose of inquiring into and determining the lawfulness of the original order, decision, or award or of the order, decision, or award following reconsideration. The application for writ of review must be made within 45 days after a petition for reconsideration is denied, or, if a petition is granted or reconsideration is had on the appeals board's own motion, within 45 days after the filing of the order, decision, or award following reconsideration."[3]

In *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (1980) 104 Cal.App.3d 528 (*Safeway*), the appellate court considered what constitutes a final order for the purposes of appeal in workers' compensation cases. The *Safeway* court looked first to the finality required in order to bring a motion for

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[3] Section 5952 limits the scope of judicial review. Section 5952 provides that review shall not extend beyond a determination of whether: "(a) The appeals board acted without or in excess of its powers. [¶] (b) The order, decision, or award was procured by fraud. [¶] (c) The order, decision, or award was unreasonable. [¶] (d) The order, decision, or award was not supported by substantial evidence. [¶] (e) If findings of fact are made, such findings of fact support the order, decision, or award under review."

reconsideration before the WCAB. Section 5900, subdivision (a) gives any person "aggrieved directly or indirectly by any final order, decision, or award made and filed by the appeals board or a workers' compensation judge under any provision contained in [the statute]" the right to "petition the appeals board for reconsideration in respect to any matters determined or covered by the final order, decision, or award . . . ."

The *Safeway* court reviewed cases construing finality for the purposes of a motion for reconsideration and found a "final order" for purposes of section 5900 includes any order that settles, for purposes of the compensation proceeding, an issue critical to the claim for benefits, whether or not it resolves all the issues in the proceeding or represents a decision on the right to benefits. (*Safeway*, *supra*, 104 Cal.App.3d at pp. 534-535; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (1978) 82 Cal.App.3d 39, 45.)

In *Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068 (*Maranian*), the court explained which orders were considered final: "'For example, an interim order of the Board or a WCJ that presents a threshold issue is deemed to be final, and may properly be the subject of a petition for reconsideration. A threshold issue is an issue that is basic to the establishment of the employee's rights to benefits, such as the territorial jurisdiction of the Board, the existence of the employment relationship, and statute of limitations issues. Likewise, the term "final order" includes orders dismissing a party, rejecting an affirmative defense, granting commutation,

terminating liability, and determining whether the employer has provided compensation coverage.' [Citations.] [¶] It follows that interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' for purposes of section 5900." (*Id.* at p. 1075; *Safeway*, *supra*, 104 Cal.App.3d at p. 534.)

Drawing on section 5900, the court in *Safeway* concluded that the standard for determining what decisions are subject to reconsideration under section 5900 and the standard for determining what decisions are reviewable under section 5950 should be similar. According to the *Safeway* court, "[w]hether severance and preliminary determination of threshold issues will serve statutory policy in a particular case is a question which ought to be decided, in the first instance, by the Board. Viewing sections 5900 and 5950 as establishing similar tests of ripeness will permit the appellate court to accord appropriate deference to the Board's judgment." (*Safeway*, *supra*, 104 Cal.App.3d at p. 535.)

The order at issue in *Safeway* involved a WCJ's decision against an employee on a coverage issue. The WCAB granted reconsideration and found for the employee, holding the injury was compensable and remanding for further hearing on other issues. The employer sought section 5950 judicial review of the WCAB order on reconsideration.

The court in *Safeway* examined the policies supporting piecemeal review during compensation proceedings in breach of the usual rule requiring finality. The court noted judicial

review of WCAB orders determining threshold issues may better serve the statutory scheme by furthering the objectives of expedition and economy by avoiding unnecessary litigation. In addition, the *Safeway* court pointed out courts are not obliged to grant every petition for review, and safeguards in the form of monetary sanctions exist to deter abuse of the appellate process. Finally, the court found permitting interim review would avoid prejudice to a party who fails to seek review of an order determined to be final despite a remand by the WCAB. The court then determined the case on the merits, finding the employee's injury arose in the course of employment. (*Safeway*, *supra*, 104 Cal.App.3d at pp. 533-534, 538.)

Several appellate courts have followed *Safeway*'s reasoning and rationale. (See *Kosowski v. Workers' Comp. Appeals Bd.* (1985) 170 Cal.App.3d 632, 636 [employer entitled to credit the self-employment earnings of employee against section 4850 payments]; *Ameri-Medical Corp. v. Workers' Comp. Appeals Bd.* (1996) 42 Cal.App.4th 1260 [validity and effect of section 4628 and discovery relating to medical clinic claim for reimbursement.]

In *Maranian*, *supra*, 81 Cal.App.4th 1068, the appellate court agreed with the analysis and result in *Safeway*, adopting its holding "that the test under section 5950 is the same as the test under section 5900 -- that is, a petition for review of an order by the WCAB lies when the order conclusively determines, for purposes of the compensation proceeding, a substantial issue basic to the employee's entitlement to benefits. . . . [W]e are

persuaded, as was the *Safeway* court, that the 'statutory scheme and its objectives' will be better served by permitting interim appeals of WCAB decisions resolving issues crucial to the employee's right to receive benefits. [Citation.] The early disposition of these core questions will likely promote expedition and frugality by avoiding unnecessary trials or duplicative retrials on the merits." (*Id.* at p. 1078.)

Finally, the *Maranian* court addressed the WCAB's objections to adopting the reasoning of *Safeway* and held: "Though the Legislature well knows how to be specific in setting the standards governing appellate review [citation], section 5950 is cast in general language, and, as we noted earlier, would if read literally authorize petitions for writs of review to be taken from any WCAB order, regardless of the order's subject or effect. *Safeway*'s restriction on this broad language was announced in 1980. In the intervening 20 years the statute has not been amended to negate the *Safeway* annotation. We take this inaction as an expression of the Legislature's satisfaction with the principles of *Safeway*. While we agree that a failure to act by the lawmakers in the face of a judicial decision construing a statute is not conclusive in determining the legislative intent behind the statute [citation], we think the long quiet interval here gives rise to as strong an arguable inference of

acquiescence as is possible." (*Maranian*, *supra*, 81 Cal.App.4th at p. 1080.)[4]

II

Applying the rubric developed by *Safeway* and *Maranian*, we find Ridgeway's petition for reconsideration raised, and the WCAB's reconsideration decision was a final ruling on, a threshold issue affecting a substantial right. The admissibility of Ridgeway's expert Sidhu's testimony on the issue of Ridgeway's *LeBoeuf* claim is pivotal to the question of Ridgeway's entitlement to benefits. A legally incorrect decision by the WCAB allowing the testimony would prevent petitioners from exercising a substantial right to which they are entitled -- the ability to rely on the discovery statutes and to be fully informed of expert testimony prior to hearings. If the WCAB's reading of the statutory requirements for informing the opposing party of potential expert testimony is incorrect, petitioners will, in effect, have been sandbagged, surprised by undisclosed expert testimony on a crucial issue.

The interpretation of the discovery statute is also determinative of the scope of trial. With the aid of the

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[4] In *Maranian*, the court considered whether the facts before the WCAB triggered the presumption of section 5402 and found the question "pivotal to the question of Maranian's entitlement to benefits." (*Maranian*, *supra*, 81 Cal.App.4th at p. 1080.) The court concluded: "[A]n authoritative pretrial decision about the presumption's application in this case will promote both efficiency and economy, by on the one hand avoiding the waste of a plenary trial on liability and on the other by avoiding a duplicate or wasteful retrial on benefits." (*Id.* at p. 1081.)

testimony by Sidhu, Ridgeway may be able to establish a *LeBoeuf* claim, finding her 100 percent disabled because she is medically and vocationally precluded from competing in the labor market. If Sidhu's testimony is not allowable under the relevant discovery statutes, Ridgeway's *LeBoeuf* claim disappears. As a corollary, petitioners' liability to Ridgeway hinges upon the admissibility of Sidhu's testimony.

We in no way imply that all orders concerning discovery disputes automatically qualify as appealable orders. Interim orders that do not decide a threshold issue, such as intermediate evidentiary decisions, are not final for purposes of section 5900 and as a corollary should not be final under section 5950.

In *Hughes v. Willig Freight Lines* (1981) 46 Cal.Comp.Cases 685 (*Hughes*), the WCAB denied a petition for consideration of an order directing the exhumation and autopsy of a deceased worker. The WCAB found the order not "final" under section 5900, noting: "Even by applicant's view . . . the order for autopsy is one regulating the production or presentation of evidence, rather than determining substantive rights." (*Id.* at p. 688.) The WCAB also reasoned: "To allow delay for reconsideration and judicial review would, as a practical matter, make autopsy impossible in most, if not all, cases. This would completely undermine the legislative purpose." (*Ibid.*)

Unlike the order in *Hughes*, the order in the present case finding the testimony of an expert admissible under the discovery statute is not an order regulating the production or

presentation of evidence but an order determining a substantive right of liability. In addition, an authoritative pretrial decision about the admissibility of expert testimony under the discovery statute will promote both efficiency and economy. If the expert testimony is not admissible, a pretrial decision will avoid the waste of a trial on the *LeBoeuf* issue. In our estimation, these characteristics of the WCAB's decision on reconsideration bring it within the ambit of appealability announced by *Safeway* and *Maranian*.

III

Petitioners contend the WCAB's decision to admit the testimony of Sidhu runs afoul of section 5502, former subdivision (d)(3), which states: "If the claim is not resolved at the mandatory settlement conference, the parties shall file a pretrial conference statement noting the specific issues in dispute, each party's proposed permanent disability rating, and listing the exhibits, and disclosing witnesses. Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter *shall not be admissible* unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference." (Italics added.)

The purpose of the disclosure requirement in section 5502 is self-evident: "'to guarantee a productive dialogue leading, if not to expeditious resolution of the whole dispute, to thorough and accurate framing of the stipulations and issues for

hearing.' [Citation.]" (*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1995) 37 Cal.App.4th 675, 684-685.)

In the present case, the parties filed a mandatory settlement conference statement (statement) at the mandatory settlement conference on July 10, 2001. The statement listed "Dan Sidhu re Le Beauf [*sic*]." The statement contains no reference to any report or exhibit relating to Sidhu, nor is there any reference to the substance of Sidhu's proposed testimony. The WCJ closed discovery on July 10, 2001, with the exception of allowing the parties to send film to the respective doctors for comment.

At trial, Sidhu testified he received the referral requesting his services on July 11, 2001. Sidhu met with Ridgeway thrice, and all meetings took place after the close of discovery on July 10, 2001. He testified he made his determination as to Ridgeway's vocational prospects after August 17, 2001. Sidhu did not prepare a report prior to trial, nor did Ridgeway request such a report. Sidhu described the evaluation process as on a "rush basis."

Ridgeway claims expert testimony opinion is not "further discovery" governed by section 5502. According to Ridgeway, "Respondent's expert was disclosed at the [mandatory settlement conference], which is all that is required . . . . Moreover, Respondent could not have acted with more diligence in regard to this witness, as the respondent made clear her intention to present expert opinion regarding *LeBoeuf* factors as early as January 11, 2001 in writing to the defendant." Ridgeway also

asserts “It was improper for the WCJ to view expert opinion testimony as ‘discovery’. It is not expert opinion until it is given. It can change at the time of trial.”

The amicus curiae echoes Ridgeway’s characterization of expert testimony as outside the scope of section 5502: “Preparation of trial testimony by a witness for the party intending to offer that testimony is not an identified discovery activity except where that witness is a medical expert. While the act of an adverse party to ascertain the likely testimony of such an individual by deposition clearly falls within discovery within a workers’ compensation claim. The preparation for such testimony is not discovery.”

“In construing a statute, our role is limited to ascertaining the Legislature’s intent so as to effectuate the purpose of the law. [Citations.] We look first to the words of the statute because they are the most reliable indicator of legislative intent. [Citation.] If the statutory language on its face answers the question, that answer is binding unless we conclude the language is ambiguous or it does not accurately reflect the Legislature’s intent. [Citations.]” (*Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1271.)

Here, if the mandatory settlement conference does not settle the dispute between the parties, section 5502 requires the filing of a pretrial conference statement identifying the specific issues in dispute, each party’s proposed permanent disability rating, the exhibits, and the witnesses. Nothing in the plain language of section 5502 requires the disclosure of

the content or substance of the witness's testimony.[5] The standardized pretrial conference statement forms filled out by the parties in this case provide no space for descriptions of the witnesses' proposed testimony, only space to identify witnesses.

However, as petitioners point out, section 5502, former subdivision (d)(3) also provides that "[d]iscovery shall close on the date of the mandatory settlement conference" and that "[e]vidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference." In our view, "discovery" as used in section 5502 is a reference to pretrial processes undertaken to obtain information about an opposing party's case in preparation for trial. It consists of actions calculated to discover information about an adversary's case, not the collection and organization of information about one's own case. Therefore, the discovery restriction in section 5502 is not implicated in the present dispute.

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[5] The disclosure requirements under Labor Code section 5502 are less rigorous than those required under Code of Civil Procedure section 2034. Section 2034 requires, under some circumstances, that parties include as part of expert witness disclosure a brief narrative statement of the general substance of the expert's proposed testimony. (Code Civ. Proc., § 2034, subd. (f)(2)(B).)

Section 5502 also provides that evidence not disclosed or obtained after the mandatory settlement conference will not be admissible. Disclosure refers to the disclosure of exhibits and witnesses in the pretrial conference statement. Therefore, evidence not disclosed on the statement or obtained after the conference is not admissible. The question becomes, what constitutes evidence in this case? Is the substance of the expert's testimony "evidence" that is obtained after the conference?

Since section 5502 requires only disclosure of exhibits and witnesses, evidence not disclosed on the pretrial conference statement or obtained subsequent to the conference can only refer to the identity of witnesses and specification of exhibits. As noted, the language of section 5502 does not require disclosure of the *substance* or *content* of a witness's testimony. Since disclosure of content is not required, failure to disclose or later development of such testimony does not run afoul of section 5502.

If a party fails to disclose the identity of a witness or an exhibit in the pretrial conference statement, such evidence is inadmissible under section 5502. If a party subsequently locates an exhibit or obtains a witness following the filing of the pretrial conference statement, again, such evidence is inadmissible under section 5502, unless the party can show the

witness was unavailable or could not have been discovered through due diligence.[6]

The content of a witness's testimony suffers no such infirmity. Here, Ridgeway disclosed Sidhu as a witness in the pretrial conference statement. In addition, although not required to do so, Ridgeway further disclosed Sidhu would testify regarding *LeBoeuf*. Clearly, Ridgeway obtained Sidhu as a witness and disclosed his identity in conformity with section 5502.

Nor does Sidhu's subsequent development of his testimony run afoul of section 5502. Section 5502 does not require that a witness disclosed in the pretrial conference statement formulate his or her testimony prior to the filing of the statement.

We do not fear this interpretation of section 5502 will lead to abuse by parties seeking to conceal testimony from their opponents. The WCJ possesses the power to order depositions and at the mandatory settlement conference may make orders and rulings regarding the admission of evidence, including admission of offers of proof and stipulations of testimony where appropriate and necessary. (§ 5710; Cal. Code Regs., tit. 8, § 10353(a).) Faced with a party's "sandbagging" an opposing party by failing to develop expert testimony prior to the settlement conference, a WCJ may allow the deposition of the

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[6] However, under certain circumstances, such evidence may be admitted by the WCJ. (See Cal. Code Regs., tit. 8, § 10353(a), giving WCJ's the power to make orders and rulings regarding admission of evidence and discovery matters.)

expert after the mandatory settlement conference or even exclude the witness's testimony as antithetical to the aim of fruitful settlement discussions.

IV

Petitioners also argue the medical opinion of Weitz constituted substantial evidence and contend the WCAB "completely failed to take into account the credibility determination previously made by the trial judge . . . ." In a related argument, petitioners argue the WCAB erred in ordering further development of the record.

The WCAB reviewed the chronology of Weitz's testimony and found his report on Ridgeway's disability "stale." In light of the deficiency of Weitz's testimony, the WCAB ordered further development of the record.

In considering a petition for a writ of review of a WCAB decision, our authority is limited. We must determine whether the evidence, when viewed in light of the entire record, supports the award of the WCAB. We may not reweigh the evidence or decide disputed questions of fact. However, we are not bound to accept the WCAB's factual findings if we determine they are unreasonable, illogical, improbable, or inequitable when viewed in light of the overall statutory scheme. (*Mote v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 902, 909.)

Weitz last evaluated Ridgeway in May 2000. His opinion concerning Ridgeway's condition did not change from his initial report in November 1998. Given the time gap between Weitz's last report and the hearings in August and September 2000, we

cannot find the WCAB's characterization of Weitz's testimony is unreasonable, illogical, improbable, or inequitable. The WCAB did not "fail[] to take into account the credibility determination previously made by the trial judge" as petitioners assert. The WCAB simply disagreed with the WCJ's analysis of the timeliness of Weitz's report.

As petitioners acknowledge, the WCAB may order additional evidence when the record lacks substantial evidence. (*San Bernardino Community Hospital v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 928, 937-938.) Since the WCAB found Weitz's report stale, it established that a specific medical opinion was incomplete, meeting the threshold requirement for directing augmentation of the record. We find no error in the WCAB's directions to the WCJ on remand to obtain updated medical evidence. We note this does not include additional evidence on the vocational feasibility issue.

DISPOSITION

The petition is denied. We remand the case to the WCAB for the purpose of making a supplemental award of attorney fees to respondent Ridgeway for services rendered in connection with the preparation and filing of the answer to the petition for writ of review. (§ 5801.) Ridgeway is awarded costs on appeal.

RAYE, Acting P.J.

We concur:

MORRISON, J.

ROBIE, J.